

**CENTRAL PUGET SOUND
GROWTH PLANNING HEARINGS BOARD
STATE OF WASHINGTON**

PILCHUCK AUDUBON) Case No.94-3-0002
SOCIETY and SNOHOMISH)
WETLANDS ALLIANCE,)
)
Petitioners,) ORDER ON
v.) PREHEARING MOTIONS
)
SNOHOMISH COUNTY,)
Respondent.)
)

On January 31, 1994, the Central Puget Sound Growth Planning Hearings Board (the Board) issued a Prehearing Order in the above-captioned matter, setting forth a Statement of (four) Legal Issues and establishing a schedule for the filing of dispositive motions, briefs and responses. All motions were due not later than March 21, 1994.

Dispositive Motion

On March 18, 1994, Petitioners Pilchuck Audubon Society and Snohomish Wetlands Alliance (hereinafter referred to as Pilchuck) filed Petitioner's Determinative Motion, asking that the Board determine and decide Legal Issue No.1 as set forth in the Prehearing Order.¹ The Motion included Pilchuck's argument in support of the Motion.

Respondent Snohomish County (the County) filed its Memorandum in Opposition to Petitioners' Dispositive Motion on April 5, 1994. Five County documents were attached, designated as Exhibits 1 through 5.

Pilchuck filed Petitioners' Rebuttal to Respondent's Memorandum in Opposition to Dispositive Motion on April 7, 1994.

Other Motions

Petitioners

Pilchuck filed a Preliminary List of Exhibits on March 18, 1994. On the same date, it filed a Motion to Supplement List of Exhibits.

1: The remaining three issues, to be answered if the response to Issue No. 1 is affirmative, ask whether the County has complied substantively and procedurally with the requirements of the Act and Minimum Guidelines by adopting two motions, and if not, what requirements should be imposed on the County by the Board in order to achieve compliance.

The County did not file a Response.

Respondent

The County filed a Revised Index of Documents on March 18, 1994.

The County filed a Preliminary Witness List and a Preliminary Exhibit List on March 21, 1994.

The County's Motion to Supplement the Record and Memorandum in Support was also filed on March 21, 1994.

Snohomish County's Motion to Supplement the Record and Memorandum in Support (Amended) was filed on April 4, 1994.

Pilchuck filed Petitioner's Response to Respondent's Motion to Supplement Record on April 5, 1994.

The County filed Respondent's Rebuttal Memorandum in Support of Motion to Supplement Record on April 7, 1994.

Hearing on Dispositive Motion

The Board held a hearing on the dispositive motion at 10:00 a.m. on Friday, April 15, 1994 at the Board's Office, 2329 One Union Square, Seattle, Washington. The Board's three members were present: Chris Smith Towne presiding, M. Peter Philley and Joseph W. Tovar. Edward E. Level represented Pilchuck; Sue A. Tanner, Deputy Prosecuting Attorney, represented the County. Court reporting services were provided by Duane Lodell of Robert H. Lewis & Associates, Tacoma.

I. PILCHUCK'S DISPOSITIVE MOTION

In its Petition for Review, filed January 21, 1994, Pilchuck asserted that the County had failed to adopt any interim regulations designating and adopting regulations to protect critical areas, as required by the Growth Management Act, (GMA or the Act,) Chapter 36.70A RCW. It asked the Board to find and determine that the County's actions and failure to take certain actions are not in compliance with the Act and Minimum Guidelines, Chapter 365-190 WAC, and to remand the matter to the County for compliance.

The Board's Legal Issue No.1 asks:

Can County plans and regulations existing prior to the effective date of the GMA meet the requirements of the GMA to designate critical areas and adopt development regulations which protect critical areas?

Pilchuck contends that the GMA requires the County to take affirmative action to comply with its requirements for designation of critical areas and interim development regulations to protect such areas, rather than rely on previous enactments to achieve compliance, and asserts that the County has not complied with that requirement.

Conversely, the County argues that no provision in the GMA voids its existing regulatory program for protection of critical areas, requires the provision of supplemental protection, or necessitates that the County formally re-adopt its existing regulations. It asks the Board to focus on " ... achievement of the GMA's objectives rather than on the details of its process for doing so." Respondent's Memorandum in Opposition, at 13.

Discussion

In the Board's most recent decision, *Friends of the Law and Bear Creek Citizens for Growth Management v. King County*, CPSGPHB Case No.94-3-0003, Order on Dispositive Motions issued April 22, 1994, the Board held that a local government may use plans and regulations which existed prior to the effective date of the GMA for purposes of compliance with GMA requirements. However:

The Board holds that a development regulation, whether interim or implementing, must be a binding legislative enactment. The Board is not ruling that a resolution or motion can never be used to comply with GMA critical areas and natural resource lands requirements. The test is whether the public has advance notice providing the opportunity to comment before the matter is adopted; whether a public hearing is held; whether the legislative action has the force and effect of law; and whether notice of adoption is published -- regardless whether the enactment took place by way of ordinance, motion or resolution. *Friends of the Law* , at 20-21 (emphasis in original).

The Board concluded:

... in order for a local jurisdiction to incorporate such regulations and designations [that existed prior to the GMA] as GMA compliance enactments, a public hearing must be held and the local government's legislative authority must pass an enactment that explicitly indicates its intent to use pre-existing regulations to comply with the GMA. In addition, the enactment must specifically identify which documents will be so used. *Friends of the Law*, at 26-27 (emphasis in original).

The Board has therefore determined that a local jurisdiction can use plans and regulations existing prior to the GMA to comply with the GMA. However, based on the record before the Board at this time, we cannot determine what Snohomish County has or has not done to comply with the Act's requirements for designation of and development

regulations for critical areas. The issue must be decided after the Board has reviewed the record, considered the briefs, and heard arguments at the hearing on the merits.

Conclusion

Pilchuck's Motion asked the Board to hold that plans and regulations of Snohomish County existing prior to the effective date of the GMA cannot meet critical areas requirements of the GMA. The Board, having concluded that the reasoning of *Friends of the Law* and the cases cited therein apply to the motion under consideration here, answers Legal Issue No.1 affirmatively. Accordingly, Pilchuck's Dispositive Motion is denied.

II. OTHER MOTIONS

Pilchuck's Motion to Supplement List of Exhibits

Pilchuck asks that eleven exhibits, designated P 1 through P !0 (numbering corrected below), be admitted as additional evidence at hearing. It characterizes the proposed exhibits as being "part of the records of the County relating to matters material and relevant to the hearing and necessary and of substantial assistance to the Board. . . " Petitioners' Motion to Supplement List of Exhibits, at 1.

The County did not respond to the Motion.

County's Motion to Supplement the Record

!. Exhibits

The County asks the Board to allow supplementation of the record with twelve documents that" should have been included in the revised index of documents. . . but were inadvertently overlooked. . . " Eight are motions authorizing GMA-related park plans which are included in the record. The remainder are characterized as handouts and checklists related to protection of geologic hazard areas. Motion to Supplement Record, at 1-2. The proposed exhibits are listed in the County's Preliminary Exhibit List as part II, Supplemental Exhibits, at 16.

While Pilchuck does not object to the first eight proposed exhibits becoming a part of the record, it asks the Board to deny the Motion for the remaining four.

2 Witnesses

The County asks the Board to allow testimony of four employees of the County's Community Development Division: Randolph Sleight, Engineering Manager, concerning earthquake design; Tom Rowe, Grading Supervisor, concerning slope areas mapping; Larry Adamson, Water Resources Supervisor, concerning frequently flooded areas; and

Randy Middaugh, Lead Biologist, concerning the nature and administration of habitat and wetlands programs.

The County argues that because it is relying on existing plans, regulations and policies to meet GMA requirements, it will need to demonstrate such compliance in responding to Legal Issue No.3 as set forth in the Prehearing Order.

Pilchuck asks the Board to deny the County's Motion to present witnesses.

Discussion

RCW 36.70A.290(4) provides:

The board shall base its decision on the record developed by the city, county or the state and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision. (Emphasis added.)

The Board is not persuaded in this instance that the witness testimony offered by the County is either necessary or of substantial assistance.

Conclusion

Having applied the statutory test for supplementation of the record, the Board's ruling on each of the proffered exhibits and witnesses is set forth in the order below.

IV . ORDER

Having reviewed the documents listed above that were filed with the Board in support of and in opposition to the dispositive and other motions before the Board, having considered the oral arguments of the parties on the dispositive motion, and having deliberated on the matter, the Board enters the following order.

ORDERED:

1. Because the Board has answered Legal Issue No.1 affirmatively by concluding that a county can use pre-existing enactments to comply with the GMA's requirements to designate and protect critical areas, Pilchuck's Determinative Motion is denied.

2. Pilchuck's Motion to Supplement List of Exhibits:

P 1	Admitted
P2	Admitted
P3	Board takes official notice; Pilchuck to supply copy

P4 Board takes official notice; Pilchuck to supply copy
P5 May be offered at hearing
P6 May be offered at hearing
P7 Admitted
P8 (listed as P 7 in Motion) Admitted
P9 (listed as P 8 in Motion) Admitted
P !0 (listed as P 9 in Motion) May be offered at hearing
P !! (Listed as P IO in Motion) May be offered at hearing

3. The County's Motion to Supplement the Record:

A Exhibits

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Proposed exhibits Nos. 1 through 8 are admitted.
Proposed exhibits 9 through !2 may be offered at hearing.

B Witnesses

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Supplementation of the record through witness testimony will not be allowed --
the motion is denied.

So ORDERED this 26th day of April, !994.

CENTRAL PUGET SOUND GROWTH PLANNING HEARINGS BOARD

M. Peter Philley

Joseph W. Tovar

Chris Smith Towne
Presiding Officer

